United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7374

orig

To be argued by
JOHN PAUL REINER

United States Court of Appeals

FOR THE SECOND CIRCUIT

MATTHEW J. LAWLOR,

Plaintiff-Appellee,

—against—

THE GALLAGHER PRESIDENTS' REPORT, INC.,
and CYNTHIA A. BILLINGS,

Defendants-Appellants,

—and—

GULF & WESTERN INDUSTRIES, INC., DAVID N. JUDELSON
and MARTIN S. DAVIS,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
HONORABLE LLOYD F. MacMAHON, DISTRICT JUDGE

BRIEF FOR APPELLANTS

TOWNLEY, UPDIKE, CARTER & RODGERS
Attorneys for Defendants-Appellants
The Gallagher Presidents' Report,
Inc. and Cynthia A. Billings
220 East 42nd Street
New York, New York 10017
(212) 682-4567

JOHN PAUL REINER
PETER G. GOULD
RAYMOND J. SOFFIENTINI
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases: Page

Cases:

Cases:

Cases: Page

Cases:

Cases: Page

Statutes:

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STATEMENT OF THE ISSUES

Defendants-Appellants, The Gallagher Presidents' Report, Inc. ("Report") and Cynthia A. Billings ("Billings") appeal from a judgment of $45,000.00 entered in favor of

plaintiff against Report and Billings on June 6, 1975 by the United States District Court for the Southern District of New York (MacMahon, J.). Said judgment was for the claimed libel of plaintiff in an article published by Report in a weekly edition of its newsletter dated May 22, 1973 known as The Gallagher Presidents' Report (the "Presidents' Report"). The District Court dismissed all claims of defamation asserted by plaintiff against defendants Gulf & Western Industries, Inc. ("Gulf & Western"), David N. Judelson ("Judelson"), President of Gulf & Western, and Martin S. Davis ("Davis"), a Vice President of Gulf & Western; granted judgment in favor of plaintiff against appellants on the third claim set forth in Count III of the complaint; and granted judgment in favor of defendant Gulf & Western with respect to its counterclaims against plaintiff for the imposition of a trust on profits made from the misappropriation of Gulf & Western's property by plaintiff.

Plaintiff has not appealed from the judgment awarding damages on the counterclaims nor from any other part of the judgment entered below. The issues on appeal relate to the judgment entered against appellants on Count III of the complaint.

The issues for review are:

1. Is the alleged defamatory news item concerning plaintiff published in the Presidents' Report true in substance?

2. Did the lower court distort the plain meaning of the alleged defamatory news article by misconstruing one phrase therein as accusing plaintiff of a crime under Section 198-b

of the N.Y. Labor Law for taking "kick-backs" from applicants for employment with Gulf & Western?

3. In view of the finding of the District Court that appellants did not publish the article with reckless disregard for its truth or falsity, is reversal required for any one of the following separate and distinct reasons that:

> (a) Under New York law plaintiff failed to prove that appellants were motivated by actual malice within the meaning of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) since the article deals with a matter of legitimate public interest concerning a private individual; or, in the alternative,
>
> (b) Under constitutional standards, plaintiff is a limited public figure for the limited range of issues forming the subject matter of the article so that a finding of liability is precluded under Gertz v. Robert Welch, Inc, 418 U.S. 325 (1974) in the absence of a showing of actual malice· or, in the alternative,
>
> (c) Under New York law, plaintiff failed to prove that appellants were motivated by malice since the article was distributed to subscribers having a particular and common interest respecting its subject matter and is qualifiedly privileged?

4. Assuming arguendo, New York law requires no more than a showing of negligence in the publication of the article to defeat appellants' qualified privilege, did plaintiff sustain his burden of proof in the face of the reliable sources utilized by appellants, the procedures undertaken prior to publication and the substantial accuracy of the article?

5. Assuming arguendo, the alleged defamatory news item is false or that appellants do not have a qualified privilege, or, absent a qualified privilege, that plaintiff has affirmatively shown fault, is plaintiff entitled to no more than nominal damages, particularly in view of plaintiff's unlawful conduct and the proven truth of the basic facts related in the article as found by the Court?

STATEMENT OF THE CASE

This action was tried by the District Court without a jury on October 22, 23 and 24, 1974. At the conclusion of trial decision was reserved by the Court. An opinion was rendered on May 13, 1975 (394 F. Supp. 721) and judgment was entered on June 6, 1975 (440 A). Appellants filed their Notice of Appeal on June 16, 1975 (443 A).

Plaintiff, Matthew J. Lawlor ("Lawlor"), a former Vice President of Gulf & Western in charge of employee relations, brought this action in diversity for defamation arising out of statements relating to his discharge for cause. The complaint sets forth three counts; the only claim on appeal is set forth in Count III against defendants Report and Billings. Since the dismissal of the other Counts and the granting of judgment against plaintiff on the counterclaims have a bearing on the issues on appeal, a description of all claims follows:

THE COMPLAINT:

Count I: The first count asserts a claim against defendants Gulf & Western and Judelson for alleged slanderous statements made by Judelson to Lawlor in the presence of others during a meeting in the offices of Gulf & Western immediately preceding Lawlor's dismissal from the company (5A, 405A, 435A-436A; Pl. Ex 17, 449A). Judelson accused plaintiff of fraud and deceit and charged him with wrongfully receiving fees for placement of executives in breach of his duties as an officer of the company. The specific slanderous remarks alleged in the complaint as amended at trial are set forth in part in the margin below.*

(Judelson's remarks in part - Count I)

* "You don't feel, Matt, that there's any conflict of interest between your getting resumes here and giving them to the Mark Group, and having them place the people and getting a fee? Right?"

* * * *

"You, in fact, Matt, have gotten letters, from people, looking for jobs, innocently, that have been under the Mark Group letterhead, sent to people. You have received fees from Bushee, and from, uh, uh, on this one placement - the fellow's name is Dambrosky, eh . . . ."

* * * *

"I would say this Matt, that primarily is on the basis of this. I would say that if it is, it had nothing to do what, what I consider to be totally fraudulent.*** I find it, Matt, a disgrace, that an officer of this Company would enter into something like this, unbeknown to myself, who you reported to, as an absolute subterfuge to go ahead and take fees in a situation where you obviously had all of the ability to get people who would write

Judge MacMahon found that these charges of wrongdoing made by Judelson were true and afforded defendants Gulf & Western and Judelson a complete defense (415A). The District Court thus found it unnecessary to consider other defenses raised by these defendants in the nature of qualified privilege (415A).

(Judelson's remarks continued)
*(cont.)
here for resumes and put them in, I could even see you placing Mr. Boester, your own employee..."

* * * *

"...I think it is entirely fraudulent Matt, it's an insult to my intelligence and everybody else's sitting in here that you would give this rationale for this story, you know it for what it is, I know it for what it is...." ***

"...Now Matt, I told you, I gave you confidence when you came here, you did not return it Matt, in fact you must have flipped a gear someplace along the line here, and is very obvious in case you want to know about it the Management Resources opened up your eyes to what could be done outside of the company, rather than inside of the company, and that's why the Mark Group was formed..."

* * * *

"...But I want to tell you Matt, I'm not going to stand for it, I won't have for one second. I think that you must have been absolutely crazy, Matt. I'm not trying to give you a lecture, but you have gone ahead and you've ruined the job that you have here, you can get no recommendation from me, Mr. Lawlor for any possible job..."

* * * *

"But don't expect me, or anybody else in this room, or anybody else on this floor, to accept the God-damned travesty that you've tried to perpetrate as the, as the purpose behind doing this whole thing. It is so deceitful, Matt, that it's even unbecoming to you to sit here and try to tell me that. Do you think I'm that stupid - do you really think that?" (Parts omitted; for the full transcript, see Pl. Ex. 17, 449A).

Count II: The second count against Gulf & Western and Davis alleges that Davis, in the course of his employment, falsely stated to defendant Billings, the Editor and President of Report, or to one of its employees, that "plaintiff had extracted fees from Gulf for placement of executives with Gulf" (emphasis added) and that as a result of Davis' statement, Billings caused Report to publish said statement in its newspaper (6A). This claim was dismissed by the Court for failure of proof (417A).

Count III: The third count sets forth the claim of defamation now on appeal. The District Court dismissed the claims therein against Davis but entered judgment against appellants Billings and Report. Billings is the Editor and President of Report which publishes the Presidents' Report weekly and circulates it to approximately 3,000 subscribers who are senior executives in the business community (362A-364A). The article at issue, which was published in the weekly edition of May 22, 1973 (Pl. Ex. 18, 472A), relates to plaintiff's discharge by Gulf & Western, and reads in full:

> "'CHARLIE WONDERFUL' BLUHDORN CRACKS DOWN ON EXECUTIVES. Gulf & Western Industries chairman forced to oust Matthew Lawlor two weeks ago after discovery of questionable practices by Lawlor as v-p employee relations. Lawlor in charge of G+W personnel department. Reportedly set up dummy corporation Mark Group. Opened bank account for dummy corporation. Channeled unsolicited job resumes to Mark Group. Extracted fees for placement of executives with G+W. Charlie eliminates title. Turns over Lawlor's duties to director of personnel David Foreman."

The District Court granted judgment against Report and Billings in the amount of $45,000 and based its holding on only one statement in the article, to wit:

> "Extracted fees for placement of executives with Gulf & Western."

The Court relying on this phrase standing alone concluded that it could only mean that Lawlor used his position at Gulf & Western to compel "kick-backs" from executive applicants to Gulf & Western as a condition to placing them with Gulf & Western (419A) and thereby concluded that the phrase "magnified" Lawlor's wrongdoing and charged him with a violation of N.Y. Labor Law §198-b(2) (419A, 421A, 436A). The Court found liability against appellants in the face of its dismissal of the first count wherein it found that Judelson's charges of fraud and deceit by Lawlor were true (415A); that Lawlor created and operated the Mark Group as a private business venture for his personal gain (414A); that Lawlor accepted fees for the placement with third parties of executive applicants to Gulf & Western (415A); and that said fees were generated through the misappropriation of Gulf & Western's property and unauthorized use of its personnel by Lawlor (414A).

The District Court further held that appellants had no constitutional privilege, citing Gertz v. Robert Welch, Inc.,

418 U.S. 323 (1974) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964), since plaintiff was neither a public figure nor a public official (422A). Although the District Court found that Billings and Report were negligent in causing the article to be published, it also specifically held that appellants had no knowledge that the article was false and did not publish it in reckless disregard for its truth or falsity (424A, 438A [n. 23]). The District Court's finding requires dismissal of the complaint.

THE COUNTERCLAIMS : Gulf & Western brought four counterclaims against Lawlor to account for and pay over to Gulf & Western proceeds received from his unauthorized appropriation of the property, resources and information belonging to Gulf & Western which had been entrusted to him (16A-21A). The District Court found that Lawlor, through the activities of the Mark Group, had assumed a position which conflicted with his fiduciary duties owned to Gulf & Western, had misappropriated the property of Gulf & Western, and had retained the profits of such unlawful conduct in the amount of $11,700 which rightfully belonged to Gulf & Western (412A, 431A). As a result, the

District Court held that Gulf & Western was entitled to the declaration of a constructive trust of all profits made by Lawlor's enterprise still retained in the amount of $8,698.50, and awarded damages against Lawlor for $3,001.50, for a total amount of $11,700 on the counterclaims.

STATEMENT OF FACTS

The alleged defamatory article in the Presidents' Report concerning Lawlor relates to the facts surrounding his discharge from Gulf & Western because of his questionable practices and wrongful conduct through the vehicle of his personal organization, the Mark Group.

The Formation and Operations of the Mark Group by Lawlor

The record evidence and findings of the District Court show that Lawlor was Vice President of Gulf & Western in charge of employee relations and had access to and was entrusted with confidential resumes of Gulf & Western employees and applicants to Gulf & Western (102A-103A, 408A). In 1972, Lawlor was forbidden by Judelson from establishing an executive placement company within Gulf & Western for the purpose of recruiting people to Gulf & Western and for placement of people with other companies for fees (269A-274A, 412A). Despite absolute disapproval of this proposal, Lawlor set up the Mark Group in or

about August, 1972 as his own search firm outside the organization of Gulf & Western (109A, 414A). Lawlor was the President of the Mark Group and in charge of its operations (117A, 133A; Def. Ex. 29, 688A). He was assisted in his scheme by C. William McDermott ("McDermott") who worked in Lawlor's department and was subsequently fired from Gulf & Western for his participation in the Mark Group on the same day as Lawlor was discharged (81A, 142A; Pl. Ex. 17, 468A). Lawlor had also hired Stephen Markham ("Markham") not an employee of Gulf & Western, as an outside contractor to the Mark Group to help in its operations (77A, 199A-200A).

The Mark Group received several resumes channeled to it through Lawlor's department at Gulf & Western and attempted to market and place these personnel (102A-108A). In furtherance of its operations, the Mark Group used its own stationery with no reference thereon to its being a subsidiary or part of Gulf & Western (136A). It also used the secretarial and printing facilities of Gulf & Western and made use of whatever Gulf & Western personnel were necessary to carry on its activities (110A). According to Lawlor, the Mark Group had its office in the Gulf & Western building but yet it had a telephone answering service and mailing address at 31 Turn-Of-River Road in Stamford, Connecticut (109A, Def. Ex 11; 503A). (Lawlor lives in Stamford [111A]). This address was the private residence of a Mrs. Abbott who forwarded all Mark Group mail to

the address of Markham, the outside contractor to the Mark Group (Def. Ex. 11, 504A). In addition, in March, 1973 a bank account was opened for the Mark Group by McDermott under Lawlor's direction and authorization at the Union Trust Company also located in Stamford, with McDermott as the authorized signator (77A, 111A). To further disguise its clandestine operation the Mark Group even used a fictitious name (Jerry Lesty) in some of its correspondence (Def. Ex. 16; 645A-648A).

The Mark Group placed two executives for fees before its activities were uncovered and stopped by Gulf & Western. A fee was received for the placement of Charles W. Tomlinson for an executive position with Polymer Industries, Inc. in the amount of $9,000 (76A; Pl. Ex. 9, 447A; Pl. Ex. 10, 448A). In addition, it received a $2,700 fee for the placement of David Biondi ("Biondi"), an executive (i.e. tax attorney) with Gulf & Western for a position with Raybestos-Manhattan (76A). The total fee paid by Raybestos-Manhattan was split with Lee Zetlin, who was the principal of a placement service in Stamford (161A-162A; 203A). Both fees of $11,700 were deposited in the Mark Group bank account in Stamford pursuant to Lawlor's instructions (77A; Def. Ex. 18, 654A; Def. Ex. 19, 658A-659A).*

* This amount of $11,700 was the subject of Gulf & Western's counterclaim.

The record shows and the District Court found that Lawlor was operating a "dummy" company of his own wholly apart from Gulf & Western through which Lawlor received fees rightfully belonging to Gulf & Western (412A). No one in senior management at Gulf & Western ever authorized or was made aware of the formation or operation of the Mark Group (155A, 268A, 415A), nor was the bank account opened with the knowledge or consent of the Treasurer's office at Gulf & Western (164A).

The foregoing facts were uncovered in early 1973 when an investigative consulting firm was hired by Gulf & Western to investigate leaks of corporate information to various media (242A-243A). In the course of this investigation, the existence of the Mark Group and plaintiff's clandestine activities were discovered (244A-253A). A written report dated April 24, 1973 was prepared by the investigator and delivered to Gulf & Western (253A).

Lawlor's Dismissal and Subsequent Publication of the Article in The Presidents' Report

On April 26, 1973, a meeting was held at Gulf & Western and Lawlor was confronted with his "questionable practices"

concerning the Mark Group by Judelson (Pl. Ex. 17, 449A)*. All of Judelson's accusations including his charges of fraud and deceit made during the meeting of April 26 and alleged by Lawlor to be slanderous, were found to be true by the District Court (415A). At the conclusion of the meeting Lawlor was dismissed from Gulf & Western. Lawlor's title was eliminated by Bluhdorn and his job was split among three people (315A).

After Lawlor had been discharged, the amount of $11,700 on deposit in the Mark Group bank account in Stamford was withdrawn by McDermott on Lawlor's instructions (112A-113A; Def. Ex. 19, 660A). The District Court imposed a trust on the funds still retained in the amount of $8,698.50 and awarded Gulf & Western damages against Lawlor for the balance spent of $3,001.50, for the total amount originally deposited in the account of $11,700 (432A).

Publication of the Article About Lawlor

An account of Lawlor's discharge was reported in the Presidents' Report in the weekly edition for May 22, 1973. Approximately one week prior to the publication of the article, Billings received the information contained therein from a

* A transcript of the meeting was received in evidence at trial excerpts of which constitute the alleged slander by Judelson quoted in part in the footnote on pp. 5-6 supra. (See Pl. Ex. 17, 449A) for the complete transcript of Judelson's charges.

professional journalist formerly employed by Report and known to her for a period of six or seven years and who had proven reliable and authoritative in the past (366A-367A). Another source, a corporate executive, confirmed the information received by Miss Billings (367A-368A). The information contained in the last two statements in the article were received from a source in Gulf & Western (372A-373A). An effort to contact Lawlor prior to publication was unsuccessful (375A) and because of the timeliness of the article, it was published in the weekly edition of May 22, 1972 after the Editor, Miss Billings, was satisfied with the substantial accuracy of the article.

SUMMARY OF ARGUMENT

Appellants contend that the proof adduced at trial and the findings of the District Court, particularly as to the truth of the statements complained of in Count I of the complaint and the granting of judgment to Gulf & Western in its counterclaims for the imposition of a constructive trust ex maleficio on the funds unlawfully received by Lawlor through the Mark Group, show conclusively that the article published in the Presidents' Report concerning plaintiff is true in substance. The finding of falsity by the District Court is based upon a distortion of the plain meaning of just one statement in the article.

Further, in view of the District Court's conclusion that appellants did not publish the article with actual malice, reversal is required both under constitutional standards and under the controlling New York law. In any case, the District Court's finding of negligence in the publication of the article in the Presidents' Report is unsupported and erroneous as a matter of law and fact.

Finally, in view of all the evidence in this case, particularly the findings made by the District Court with respect to plaintiff's fraudulent, deceitful and wrongful conduct, only nominal damages should have been awarded, assuming arguendo, appellants are liable in the first instance.

POINT I

THE EVIDENCE AT TRIAL SHOWS CONCLUSIVELY THAT THE ARTICLE AT ISSUE IS TRUE IN SUBSTANCE

It is well settled in New York* as in most jurisdictions that the truth of otherwise defamatory statements concerning a plaintiff, affords an absolute and unqualified defense to a defamation suit. Curtis Publishing Co. v. Butts, 388 U.S. 130, 151 (1967); Commonwealth Motor Parts Ltd. v. Bank of Nova Scotia, 44 App. Div. 2d 375, 355 N.Y.S. 2d 138 (1st Dep't 1974); Dolcin Corporation v. Reader's Digest Ass'n, Inc., 7 App. Div. 2d 449, 183 N.Y.S. 2d 342 (1st Dep't 1959).

It is equally well established that truth need not be established to an extreme literal degree; complete accuracy with respect to every detail in the article complained of is not required but only truth in substance. See, e.g., Yarmove v. Retail Credit Company, 18 App. Div. 2d 790, 236 N.Y.S. 2d 836 (1st Dep't 1963); O'Connor v. Field, 266 App. Div. 121, 41 N.Y.S. 2d 492 (1st Dep't 1943); Mack, Miller Candle Co. v. The MacMillan Co., 239 App. Div. 738, 269 N.Y.S. 33 (4th Dep't), aff'd 266 N.Y. 489, 95 N.E. 167 (1934).

In the leading case of Fleckenstein v. Friedman, 266 N.Y. 19, 193 N.E. 537 (1934) the New York Court of Appeals

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* The District Court held that New York law was controlling in this diversity action. (408A).

stated the complete defense of substantial truth as follows at p. 23):

> "... A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced."

In other words, the defense of truth does not necessitate a showing that every single reference to plaintiff's activities contained in the article was true. Faulk v. Aware, Inc., 9 Misc. 2d 815, 818-19, 169 N.Y.S. 2d 363 368 (Sup. Ct. N.Y. Co. 1957). It does not require that the truth be proven in the exact form as charged; it is only necessary to show facts substantially as broad as the alleged libel. Greenberg v. Winchell, 136 N.Y.S. 2d 877, 878 (Sup. Ct. N.Y. Co. 1954), appeal dismissed, 1 App. Div. 2d 1008, 154 N.Y.S. 2d 835 (1956).

The Court of Appeals has characterized this defense of truth in terms of the "sting" of the article or the effect it has on the mind of the readership. Fleckenstein v. Friedman, supra, 266 N.Y. at 23.

With respect to the "sting" of the article at issue, the substantial truth of every statement therein about Lawlor has been abundantly proven as found in the record of the trial and as appears from the findings of the District Court. The readers of the news item in the Presidents' Report (specifically the executives who subscribed thereto) would very plainly understand from its overall content that Lawlor, Vice President of employee relations at Gulf &

Western was ousted from the company for questionable practices which included the formation of a dummy company by Lawlor for his personal gain to which unsolicited resumes were channeled and through which fees were paid by the hiring companies for the placement of executives. That is the "sting" of the article; that is what Lawlor did. Clearly, the District Court's tortured and unreasonable interpretation of one phrase in the article (not pleaded or argued by plaintiff or the subject of any record evidence) as the only meaning it could have to the reader, and its further assumption that the entire article was then rendered false and defamatory, is unjustified and unwarranted and requires reversal of the judgment against appellants.

A. Each Statement in the Article Is True in Substance

At this juncture, each statement of the article will be examined seriatim. The facts supporting each statement are set forth above in the Statement of Facts and only brief reference to the record evidence and the findings of the trial court will be included here to show the truth of the article.

The article is entitled: "'CHARLIE WONDERFUL' BLUHDORN CRACKS DOWN ON EXECUTIVES."

Statement #1. "Gulf and Western Industries chairman forced to oust Matthew Lawlor two weeks ago after discovery

of questionable practices by Lawlor as v-p employee relations." This introductory statement has been found to be true by the District Court (408A-415A). In view of plaintiff's serious wrongdoing which included the misappropriation of the property of Gulf & Western and the unlawful receipt of fees belonging to Gulf & Western, the reference in the article to "questionable practices" is indeed a rather mild term. With respect to the corporate official who "ousted" Lawlor the record evidence shows that prior to Judelson's confrontation with Lawlor, Bluhdorn stated to Judelson that Lawlor would have to be discharged if the investigative report were true (306A, 351A). Since Bluhdorn sets the policies and directives of the company as Chairman of the Board, it is clear that Lawlor was ousted with Bluhdorn's authorization and approval as plaintiff himself conceded at trial (152A). In any event, the inescapable truth remains that plaintiff was ousted by the company for questionable practices.

Statement #2. "Lawlor in charge of G + W personnel department." There was never any dispute that this statement is true and plaintiff does not claim the statement to be defamatory or actionable (95A).

Statement #3. "Reportedly set up dummy corporation Mark Group." The finding of the District Court and the proof adduced at trial clearly establish the truth of the statement. The facts in the record which compelled the District Court to

conclude that Lawlor was operating the Mark Group as a private business venture for his personal gain or in effect a "dummy corporation" include: the organizational chart prepared by plaintiff showing the Mark Group as part of "MJL Enterprises" (Def. Ex. 5, 491A); plaintiff's admission that MJL Enterprises was an extension of himself for which he took tax deductions (121A, 221A-223A); plaintiff's admission that he did not discuss the Mark Group project with his superiors during its period of operation (155A); his establishment of a mailing address and answering service, as well as a bank account, in Stamford for the Mark Group (109A-111A); his use of Gulf & Western's employees, facilities and materials for the work of the Mark Group (110A); his offers to Gulf & Western employees who were requested to leave Gulf & Western to join the Mark Group (124A-132A, 206A-207A); the letters which show that Lawlor was referred to as the President of the Mark Group (157A; Def. Ex. 29, 688A, 689A); and inquiries made by McDermott to the Secretary of State of New York concerning the incorporation of the Mark Group (Def. Ex. 28, 684A-687A). In view of the undisputed evidence, it is plain that by its operations and in its dealings, the Mark Group was a "dummy corporation" set up by Lawlor thus amply justifying the statement made in the Presidents' Report.

Statement #4. "Opened bank account for dummy corporation." The undisputed proof and the District Court's

findings show that plaintiff established a bank account in Stamford under the name of the Mark Group without approval or knowledge of Gulf & Western (77A, 268A, 413A). Plaintiff admitted that he never informed anyone in the controller's office or treasurer's office at Gulf & Western that a bank account had been opened (164A).

Statement #5. "Channeled unsolicited job resumes to Mark Group." The District Court concluded that the Mark Group appropriated resumes submitted to Gulf & Western by persons seeking positions therein (414A-415A). Plaintiff could not and did not deny this obvious fact at trial (95A).

Statement #6. "Extracted fees for placement of executives with G+W." The erroneous addition of certain words to this statement by the District Court and the tortured construction of the statement as thus amended are treated at length in Point II infra. At this time, the substantial truth of the statement as written and as read in context with the entire article will be discussed in relation with the record evidence.

The undisputed facts show that $11,700 in fees were taken by the Mark Group, Lawlor's personal and covert enterprise, for the placement of two executives, Tomlinson and Biondi, with companies outside Gulf & Western (76A, 420A). Tomlinson was an applicant to Gulf & Western; Biondi was an executive who had been with Gulf & Western (159A). Thus,

although fees were not taken for placing employees into Gulf & Western, a fee was taken for the placement of Biondi who had been an executive with Gulf & Western. Read in this context the statement is of course literally true in every detail.

However, even if the statement were to be construed as not literally accurate in that the fees involved "placements" to companies other than Gulf & Western rather than "in-placements", the distinction is of no significance with respect to its effect upon the mind of the readership or the defense of substantial truth. Fleckenstein v. Friedman, supra, 266 N.Y. at 23. The impact of "sting" of the statement lies in the fact that fees were taken for the placement of executives; whether the employer was Gulf & Western or a third party is irrelevant; whether the fees were paid by the applicants themselves or the new employer is irrelevant since they were in fact paid.

In order to sustain the strained claim of "libel", the District Court sua sponte read certain "fine and shaded distinctions" into the plain meaning of the quoted language. The District Court simply erred in doing so because the material elements of the charge in the article are true. See Cafferty v.

Southern Tier Publishing Co., 226 N.Y. 87, 123 N.E. 76 (1919).*

Statements #7 and #8. "Charlie eliminates title. Turns over Lawlor's duties to director of personnel David Forman." These statements are accurate in every respect and not disputed by plaintiff (95A, 353A).

In summary, each of the foregoing statements as well as the article as a whole has been shown to be true in substance. The District Court clearly erred by disregarding the overwhelming evidence which more than justifies the statements made in the article.

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* A complaint with a parallel fact situation was alleged under New York law. In Cafferty v. Southern Tier Publishing Co., supra, a charge was made that plaintiff, a teacher and a supervisor, was incompetent. The facts pleaded as justification did not concern plaintiff's ability to teach, or knowledge and learning capabilities but instead concerned his perverse temperament and inability to work with other teachers. The New York Court of Appeals ruled that such distinctions do not defeat the defense of substantial truth and upheld the validity of the truth defense stating that the defense of justification would otherwise be unduly limited. The Court noted (at p. 93):

> "The libel law is not a system of technicalities, but reasonable regulations whereby the public may be furnished news and information, but not false stories about any one. When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done." (emphasis supplied)

POINT II

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ITS UNREASONABLE CONSTRUCTION OF A SINGLE PHRASE TAKEN OUT OF THE CONTEXT OF THE ARTICLE AT ISSUE

It is settled law that the meaning of an article alleged to be defamatory depends not on isolated or detached statements in the article but on the article in its entirety. November v. Time Inc., 13 N.Y. 2d 175, 178, 244 N.Y.S. 2d 309 (1963); More v. Bennett, 48 N.Y. 472, 476 (1872). The words and phrases of an article must be construed together and in fair context and considered in its total impact. See, e.g., Tracy v. Newsday, Inc., 5 N.Y. 2d 134, 137, 182 N.Y.S. 2d 1 (1954); Berkson v. Time, Inc., 8 App. Div. 2d 352, 187 N.Y. 2d 849 (1st Dep't 1959), aff'd, 7 N.Y. 2d 1007, 200 N.Y.S. 2d 775 (1960); Hirschhorn v. Group Health Ins., Inc., 13 Misc. 2d 338 340, 175 N.Y.S. 2d 775 (Sup. Ct. Kings Co. 1958), aff'd, 9 App. Div. 2d 905, 194 N.Y.S. 2d 1002 (1959). In Sydney v. MacFadden Newspaper Pub. Corp., 242 N.Y. 208, 151 N.E. 209 (1926) the Court of Appeals stated that: "[t]he court should take the defamatory publication in determining its characteristics and result in the same way that the reading public, acquainted with the parties and subject would take it" (242 N.Y. at 214). In short, it is the plain, ordinary and usual meaning of the article which controls.

The District Court grounded its finding of liability exclusively on a strained construction of the following statement in the article: "Extracted fees for placement of executives with G&W". The Court cited a sixth dictionary meaning of the word "extract" from one dictionary (Random House) and a third meaning of the same word from another dictionary (Oxford English) and concluded that when combined with the remainder of the phrase, it "can only mean" that Lawlor, through the Mark Group, compelled "kickbacks" from unwilling executive applicants to Gulf & Western as a condition for employment with Gulf & Western in violation of Section 198-b(2) of the New York Labor Law (418A-419A).

It is obvious from the words of the statement that the article makes no reference as to who paid the fees to Lawlor or the Mark Group. To infer the additional words "from unwilling executives" to the statement based wholly upon isolated dictionary meanings without reference to the overall effect of the words in the context and format of the article and without any record evidence to support such construction is contrary to the settled New York law. Greyhound Securities, Inc. v. Greyhound Corp., 11 App. Div. 2d 390, 207 N.Y.S. 2d 383 (1st Dep't 1960); Wildstein v. New York Post Corp., 40 Misc. 2d 586, 589, 243 N.Y.S. 2d 386, 389 (Sup. Ct. N.Y. Co. 1963) aff'd 261 N.Y.S. 2d 254 (1st Dep't 1965). In the Greyhound case, supra, in construing whether or not

certain words in two letters were reasonably susceptible of a libelous meaning, the Court pointed out (at p. 392):

> "...[I]n determining the capacity of these offending words to injure plaintiff, we must go beyond the dictionary definitions; and, no matter how defamatory some of the synonyms may seem when isolated, we must appraise their effect and impact in the fair context of the letters in their entirety (Berkson v. Time, Inc., 8 AD 2d 352, supra)."

Similarly, when the style of concise descriptive writing of the Presidents' Report and the overall content of the article is considered, it is apparent that the word "extracted" may not be so tortured without any record evidence as to infer "kick-backs" in violation of Section 198-b(2) of the New York Labor Law.

Equally significant, plaintiff, the person who asserts the greatest interest in determining the impact or "sting" of the article never alleged in his complaint or contended in any of the proceedings in this action by way of testimony, legal arguments or proof that he was accused in the Presidents' Report article of accepting "kick-backs" from unwilling executives. Indeed, he alleged in his complaint that Davis told Billings or Report that plaintiff had extracted fees from Gulf and that she in turn published this statement in the Presidents' Report (6A-7A). Even Judge MacMahon noted in the opinion that plaintiff himself considered the statement in the article to mean that appellants accused Lawlor of misappropriating fees from Gulf and not from the applicants (405A-406A).

Not one of plaintiff's witnesses who testified at trial concerning the impact of the article attributed the meaning of "kickbacks" to the article. Defendant Davis in his testimony at trial never gave this construction to the quoted language (354A). The first time this meaning was ever even suggested was in the District Court's decision without any record basis and predicated solely on secondary dictionary references.

The District Court ignored the pivotal charge of the statement and the effect of the article on the mind of the readership but seized upon the use of the word "extracted" as a descriptive term or a stylistic touch. Even if the word "extracted" is construed in the nature of hyperbole, that does not make the statement actionable, particularly in view of the truth of the substance or underlying facts of the article. Cf. Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970); Time Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971); Briarcliff Lodge Hotel, Inc. v. Citizen-Sentinel Publishers, Inc., 260 N.Y. 106, 183 N.E. 193 (1932); Cohen v. New York Herald Tribune, Inc., 63 Misc.2d 87, 102, 310 N.Y.S. 2d 709 (Sup. Ct. Kings Co. 1970).

In Greenbelt Cooperative Pub. Ass'n v. Bresler, supra, the United States Supreme Court construed the use of the word "blackmail" as it appeared several times in two news articles in describing plaintiff's negotiating position with the city of Greenbelt with respect to certain land transactions.

Plaintiff contended that the articles imputed to him the crime of blackmail. The Court stated (398 U.S. at 14):

> "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime." (footnote omitted)

Similarly, with respect to the phrase "Extracted fees" as used in the context of the article in question, no reader of the Presidents' Report, as an experienced business executive well versed in the practices of search companies with respect to the receipt of fees, could have thought that Lawlor was charged with taking "kick-backs" from executive applicants in violation of Section 198-b(2) of the New York Labor Law. Indeed, the District Court observed in its decision that it is common knowledge that placement fees are paid by the employer and not the applicant (437A [n. 17]).

A. Section 198-b(2) of the Labor Law (the "Kick-back statute") Does Not Apply by its Terms to Lawlor

In its decision, the District Court concluded that the statement "Extracted fees" accused Lawlor of a misdemeanor

in violation of Section 198-b(2) of the New York Labor Law. However, that specific charge read into the statement by the trial court is itself erroneous.

The so-called "kick-back statute" by its terms only applies to "workmen" and not executives.* Contrary to the District Court's conclusion (436A-437A [n. 14]), Section 198-b of the Labor Law (formerly Section 962 of the Penal Law), has no relationship to Section 198-a of the Labor Law (formerly Section 1272 of the Penal Law), a general penalty provision which protects "employees" as defined in the Labor Law (Section 190(2)). Section 198-b has its own self-contained penalty clause protecting workmen and is not dependent on Section 198-a which protects the broader class of "employees". Moreover, if the New York Legislature

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* Section 198-b provides in pertinent part:

"... 2. Whenever any workman who is engaged to perform labor shall be promised an agreed rate of wages for his services, be such promise in writing or oral, it shall be unlawful for any person, either for himself or any other person, to request, demand, or receive either before or after such workman is engaged, a return, donation or contribution of any part or all of said workman's wages, salary, or other thing of value, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment. Further, any person who directly or indirectly aids, requests or authorizes any other person to violate any of the provisions of this section shall be guilty of a violation of the provisions of this section.

. . .

"5. A violation of the provisions of this section shall constitute a misdemeanor."

intended Section 198-b to apply to all employees, it certainly would have used that term as it did in other provisions of the Labor Law and not "workman".

The term "workman" is not defined in the New York Labor Law but it has been given meaning and content through decisional law, clearly demonstrative of the proposition that a "workman" is not synonymous with the the statutorily defined term "employee". In People v. Sherman, 201 Misc. 780, 106 N.Y.S. 2d 36 (Ct. Gen. Sess. N.Y. Co. 1951) the court looked to the legislative history of the statute and the authorities under the New York Workmen's Compensation Law and concluded that the protection of the statute encompassed all non-union and union members engaged to perform labor. See Matter of Bowne v. S.W. Bowne Co., 221 N.Y. 28, 116 N.E. 364 (1917); Matter of Gilmore v. Preferred Accident Ins. Co., 283 N.Y. 92, 27 N.E. 2d 515 (1940); Matter of Europe v. Addison Amusements, Inc., 231 N.Y. 105, 131 N.E. 750 (1921). In Matter of Bowne v. S.W. Bowne Co., supra, the Court distinguished between a workman and an employee as follows (at pp. 31-32):

> "...A workman in a broad sense is one who works in any department of physical or mental labor, but, in common speech, is one who is employed in manual labor, such as an artificer, mechanic or artisan, while an employee in a broad sense is one who receives salary or wages or other compensation from another (Gurney v. Atlantic & G.W. Ry. Co., 58 N.Y. 358), but in common speech the term is usually applied to clerks, laborers, etc., and not to the higher officers of a corporation."

From the foregoing, it is plain that the so-called "kick-back" statute only pertains to workmen or laborers and is not applicable to corporate executive applicants. Thus, the statute does not address itself to Lawlor's acts even under the District Court's strained interpretation of the statement in question. Since the predicate for the District Court's finding of defamation is missing, the decision must be reversed as a matter of law and logic.

B. The Article Did Not "Magnify" Lawlor's Wrongful Acts

The District Court based its decision awarding damages on the proposition that the statement "Extracted fees" had "magnified" the wrongdoing of Lawlor and therefore constituted actionable defamation (421A). In fact, that construction given to this statement was an understatement of Lawlor's wrongdoing as shown by the very findings of the District Court which would support charges of far more serious and nefarious misconduct by Lawlor. (412A-415A, 431A)

The District Court's finding of wrongdoing by Lawlor could support charges far greater than the construction of a charge of "kickbacks" given by the District Court to the phrase "Extracted fees". The misappropriation of confidential resumes and other property of Gulf & Western and the money ($11,700) derived therefrom are acts susceptible of a felony charge of

larceny under New York Penal Law §§155.05, 155.35.* The unauthorized appropriation and use of services or facilities of Gulf & Western for personal benefit or profit are acts susceptible of a misdemeanor charge under New York Penal Law §165.15.** Finally, the breach of trust by a fiduciary who uses the mails to further a scheme to make secret profits from his position, is susceptible of a charge under the Federal mail fraud statute, Title 18, United States Code Section 1341.*** See Post v. United States, 407 F.2d 319 (D.C. Cir. 1968), cert. denied, 393 U.S. 1092 (1969);

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* Larceny is defined in Section 155.05(1) of the New York Penal Law as follows:

> "1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof."

** Section 165.15 of the New York Penal Law provides in relevant part:

> "A person is guilty of theft of services when:
>
> * * *
>
> 7. Obtaining or having control over labor in the employ of another person, or of business, commercial or industrial equipment or facilities of another person, knowing that he is not entitled to the use thereof, and with intent to derive a commercial or other substantial benefit for himself or a third person, he uses or diverts to the use of himself or a third person such labor, equipment or facilities."

*** Section 1341 of Title 18 U.S.C. provides as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent (cont'd)

United States v. Groves, 122 F.2d 87 (2d Cir.), cert. denied, 314 U.S. 670 (1941); United States v. Buckner, 108 F.2d 921 (2d Cir.), cert. denied, 309 U.S. 669 (1940); United States v. Dorfman, 335 F. Supp. 675 (S.D.N.Y. 1971); United States v. Hoffa, 205 F. Supp. 710 (S.D. Fla. 1962).

In the face of the foregoing, Judge MacMahon's conclusion that appellants "magnified" Lawlor's wrongdoing is manifestly erroneous. Certainly Lawlor's wrongful acts found by District Court are as reprehensible, if not more so, than the assumed charge of violation of the Labor Law statute. The District Court's conclusion that a "graver impact" and "more devastating injury" would be created in the mind of the reader than the publication of truth would have produced is baseless and the decision should be reversed on this ground alone.

(footnote cont'd)

> pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

POINT II

THE TRIAL COURT'S FINDING THAT PLAINTIFF FAILED TO DEMONSTRATE "MALICE" ON THE PART OF APPELLANTS REQUIRES REVERSAL OF THE JUDGMENT OF LIABILITY AS TO APPELLANTS REPORT AND BILLINGS

The District Court determined that appellants Report and Billings were liable for certain assumed actual damages because of negligence in the publication of the article about plaintiff. However, the Court expressly rejected plaintiff's contention that appellants' conduct involved knowledge of falsity or reckless disregard of the truth of the statements contained in the publication and found, at footnote 23:

> ". . . an examination of the record reveals defendants Billings and Report did not publish the article with a high degree of awareness of its probable falsity, and plaintiff's contention is without merit." (438A)

This finding coupled with complete lack of record evidence that defendants were motivated by malice toward plaintiff requires reversal of the judgment entered against appellants because liability may not be predicated only upon a determination of negligence in the publication of the article under New York law and also under constitutional standards.

The District Court held that New York State has adopted the minimum "negligence" standard permitted in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) as a matter of federal constitutional law for actual injuries to the reputations of private individuals.

Contrary to the District Court's holding, New York has followed the greater protection given to publishers in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), and as allowed by Gertz v. Robert Welch, Inc., supra, (see discussion infra). Absent the necessary degree of malice as specifically found below, the District Court erred in not holding the publication was privileged and non-actionable under the Rosenbloom standard adopted by New York.

In Rosenbloom v. Metromedia, Inc., supra, the Supreme Court stated that a plaintiff could not sustain an action for defamation as a private individual involved in an event of current interest absent knowing falsity or a reckless disregard of the truth in the publication. Simple negligence in the publication was held to be insufficient because of the requirement that publishers have the necessary "breathing space" under the First Amendment. In Gertz, the Supreme Court limited this rule in Rosenbloom as a minimum constitutional standard, but then held that the States were free to establish their own standards for the privilege defense, provided that as a minimum requirement the states required a showing of negligence before an alleged defamatory statement was actionable. Thus, New York State was still free to adopt the greater protection for publishers afforded in Rosenbloom. The District Court below erred in not applying the Rosenbloom standard adopted by New York but rather utilized the negligence standard

specified by Gertz only as a minimum requirement.

The District Court also erred in rejecting appellants' contention that even under the narrower holding of Gertz applicable as a constitutional protection to publishers, malice must be demonstrated by plaintiff because of: (a) the limited scope of the publication in terms of its subject matter dealing with plaintiff in his capacity as a corporate executive; and (b) the limited nature of its distribution to subscribers who are senior corporate executives having a particular and common interest in the subject matter of the publication. Specifically, the District Court rejected the concept that under the Gertz standard plaintiff was a "limited public figure" for the "limited issues" of the Mark Group incident to the "limited" readership of subscribers of the Report. The Court stated that "such a rule would sweep all corporate officers under the restrictive New York Times rule and distort the plain meaning of the public official or public figure category beyond all recognition" (422A). Appellants submit that the District Court's construction of the privilege applicable to the publication complained of is contrary both to the Supreme Court's amplification of the privilege of the New York Times rule in Rosenbloom as clarified by Gertz and also under settled New York law.

In brief, appellants submit that, in predicating liability upon a simple negligence standard, the Court below committed three distinct errors of law, each one of which

requires reversal of the judgment of liability against appellants.

We treat each distinct ground for reversal in turn below.

(1) New York Law Post-Gertz Requires A Demonstration by Plaintiff That Appellants Published With Knowledge Of Falsity Or Reckless Disregard Of The Truth

Under New York law, the standard for recovery by a private individual involved in a matter of public interest remains dependent upon proof of publication with a knowing falsity or reckless disregard of the truth. This standard was established by New York in cases preceding Rosenbloom v. Metromedia, Inc., supra, (the Rosenbloom standard being the same as that adopted by the Court of Appeals of the State of New York) and has been followed in appellate and lower court opinions subsequent to the Gertz decision.

The Appellate Division of the New York Supreme Court handed down in July 1975 the most recent decision directly on this point in Safarets, Inc. v. Gannett Co., Inc., ___ A.D.2d ___, ___ N.Y.S.2d ___ (Third Dep't 1975) affirming per curiam, 80 Misc.2d 109, 361 N.Y.S.2d 276 (Sup. Ct. Broome Co. 1974). In Safarets, the Appellate Division affirmed on the opinion of the New York Supreme Court the summary judgment granted

dismissing the complaint of defamation over plaintiff's contention that in light of Gertz, the Rosenbloom rule no longer applied in New York. The Court held at page 280:

> "A review of New York law indicates that the Court of Appeals has adopted the Rosenbloom rule in Frink v. McEldowney, 29 N.Y. 2d 720, 325 N.Y.S. 2d 755, 275 N.E. 2d 337; Kent v. City of Buffalo, 29 N.Y. 2d 818, 327 N.Y.S. 2d 653, 277 N.E. 2d 669; Twenty-Five East 40th Restaurant Corp. v. Forbes Inc., 30 N.Y. 2d 595, 331 N.Y.S. 2d 29, 282 N.E. 2d 118, and Trails West Inc. v. Wolff, 32 N.Y. 2d 207, 344 N.Y.S. 2d 863, 298 N.E. 2d 52 . . . . Though the Gertz case permits the State to adopt standards less demanding than those required by New York Times where private individuals are involved in matters of public interest, it does not hold that States may not adhere to a more demanding standard such as that standard laid down in Rosenbloom. We are much impressed by the plaintiffs' argument based on the reasoning of the majority opinion in Gertz . . [w]ere it for us to decide, we would espouse some lesser standard as permitted in Gertz where private persons are defamed. However, we cannot anticipate whether the Court of Appeals will abandon the Rosenbloom doctrine or, if it should, what standard of care it might adopt. Therefore, we are bound to adhere to the Rosenbloom rule as adopted by the Court of Appeals." (Emphasis supplied)

Similarly, Mr. Justice Gellinoff of the New York Supreme Court recently held in Commercial Programming Unlimited v. CBS Inc., 81 Misc. 2d 678, 367 N.Y.S. 2d 986 (Sup. Ct. N.Y. Co. 1975), that the "negligence" standard permitted by the Supreme Court in the Gertz case as the minimum requirement for fault under the constitution, is not the rule to be applied in New York. There, the Court granted summary judgment to

defendants because plaintiffs, determined by the Court to be private individuals, failed to prove that defendants published an article allegedly defamatory of them with knowledge of falsity or with reckless disregard of the truth. After careful and detailed review of numerous pre-Rosenbloom precedents requiring the application of the Times v. Sullivan malice standard in cases involving matters of public interest regardless of the status of the particular plaintiff, the Court concluded (81 Misc. 2d at p. 686):

> "There is, accordingly, ample justification for the statement that 'New York Courts also held, even before Rosenbloom, that communications involving matters of public concern fall within the protection of the New York Times privilege' [Schwartz v. Time Inc., 71 Misc. 2d 769, 771 337 N.Y. Supp. 2d 125, 129 (Sup. Ct. N.Y. Co. 1972) (Culkin, J.)]."

The Court then determined that following Rosenbloom the Court of Appeals had adopted the Rosenbloom rule and found that the Supreme Court opinion in the Gertz case did not change the requirement that private plaintiffs involved in a matter of public interest must demonstrate that defendants published the matter complained of with knowledge of falsity or reckless disregard of the truth. The Court held that (81 Misc. 2d at 686):

> "In this court's view the impact of these precedents is not diluted by Gertz. Indeed, pursuant to the authority given it by Gertz, this State ought now reaffirm their reasoning and conclusions (cf. Safarets v. Gannett Co., 80 Misc. 2d 109).

In addition to the above recent decisions directly on point here, the law of New York is also found in the numerous pre-Rosenbloom and post-Rosenbloom decisions requiring for actionable defamation a demonstration of knowing falsity or reckless disregard of the truth in actions by private individuals involved in a matter of public interest. For pre-Rosenbloom decisions see: Gilbert v. Goffi, 21 App. Div. 2d 517, 251 N.Y.S. 2d 823 (2d Dep't 1964), aff'd, 15 N.Y. 2d 1023, 260 N.Y.S. 2d 29; Garfinkel v. Twenty-First Century Publishing Co., 30 App. Div. 2d 787, 291 N.Y.S. 2d 735 (1st Dep't), appeal dismissed, 22 N.Y. 2d 970, 295 N.Y.S. 2d 336 (1968); Pauling v. National Review, 49 Misc. 2d 975, 269 N.Y.S. 2d 11 (Sup. Ct. N.Y. Co. 1966), aff'd, 27 App. Div. 2d 903, 281 N.Y.S. 2d 716 (1st Dep't 1967), aff'd, 22 N.Y. 2d 818 (1968); Fotochrome Inc. v. New York Herald Tribune Inc., 61 Misc. 2d 226, 305 N.Y.S. 2d 168 (Sup. Ct. Queens Co. 1969); Lloyds v. United Press International Inc., 63 Misc. 2d 421, 311 N.Y.S. 2d 373 (Sup. Ct. N.Y. Co. 1970); Cohen v. New York Herald Tribune Inc., 63 Misc. 2d 87, 310 N.Y.S. 2d 709 (Sup. Ct. Kings Co. 1970); see Schwartz v. Time Inc., 71 Misc. 2d 769, 771, 337 N.Y.S. 2d 125 (Sup. Ct. N.Y. Co. 1972). For post-Rosenbloom decisions see: Frink v. McEldowney, 29 N.Y. 2d 720 (1971) 325 N.Y.S. 2d 755; Kent v. City of Buffalo, 29 N.Y. 2d 818, 327 N.Y.S. 2d 653 (1971); Twenty-Five East 40th Street Restaurant Corp. v. Forbes, Inc., 30 N.Y. 2d 595, 331 N.Y.S. 2d 29 (1972); Trails West Inc. v.

Wolff, 32 N.Y. 2d 207, 344 N.Y.S. 2d 863 (1973); and, for post-Gertz decisions see: Commercial Programming Unlimited v. Columbia Broadcasting Systems, Inc., 367 N.Y.S. 2d 986 (Sup. Ct. N.Y. Co. 1975); Med-Den Enterprises Inc. v. Forbes Inc., (Sup. Ct. N.Y. Co. 1975), N.Y.L.J. (4/14/75), page 2, col. 6; Jet Asphalt Corp. v. N.Y. Post Corp., (Sup. Ct. N.Y. Co. 1975), N.Y.L.J. (6/5/75, page 16, col. 7).

In Trails West Inc. v. Wolff, supra, the New York Court of Appeals adopted the rationale of the Rosenbloom plurality in holding that the Times v. Sullivan standard applied to publications involving matters of public interest and public concern thereby requiring a plaintiff, whether public official, public figure or private individual, to demonstrate that defendants published the defamatory matter complained of with knowing falsity or reckless disregard of the truth. In granting summary judgment to defendants, the Court referred to two of its prior decisions as well as that of the Supreme Court's decision in Rosenbloom and observed of the bus accident there involved (32 N.Y. 2d at 216):

> "The subject was certainly as newsworthy as the arrest of a person for distributing allegedly obscene magazines (Rosenbloom v. Metromedia, 403 U.S. 29, 45, supra); the quality of food in the plaintiff's restaurant (Twenty-Five East 40th Street Rest. Corp. v. Forbes, Inc., 30 NY 2d 595); a dispute about a garbage disposal (Frink v. McEldowney, 29 NY 2d 720) or inaccuracies in the testing of clinical specimens by a mail order laboratory (United Medical Labs v. Columbia

Broadcasting Systems Inc., 404 F.2d 706, cert. denied, 394 U.S. 921."

Despite authoritative and settled law to the contrary, the Court below erroneously found with footnote reference to two lower New York court decisions, that "[e]xamination of New York decisions since Gertz shows that the New York courts have adopted its [viz. Gertz] negligence standard" (424A). Defendants submit that the trial court's complete reliance on these two lower court decisions, Caldwell v. Bantam Books Inc. (Sup. Ct. N.Y. Co. N.Y.L.J., 11/1/74, page 17, col. 2) and Bailey v. Hahn, (Sup. Ct. West Co., N.Y.L.J., 7/23/74, page 12, col. 7) is misplaced. The Caldwell decision is inapposite in that the complaint was dismissed as time barred and insufficient in law and the Court merely noted in dicta that the complaint was further deficient in failure to allege "any fault" on the part of the publisher. The Bailey decision sets forth a test for fault based on whether the defendant acted as a "reasonably prudent publisher" in a denial of a motion for summary judgment. This test is simply not the standard required by New York law.

In view of the authoritative law of New York discussed above, even if plaintiff is considered a purely private individual, the holding by the District Court that defendants did not publish the article with knowledge of falsity or reckless disregard of the truth of the statements contained therein, requires reversal of the judgment below as a matter of law.

(2) As A Matter of Constitutional Law Plaintiff's Failure to Demonstrate That Defendants Published The Article Complained Of With Knowledge Of Falsity Or Reckless Disregard Requires Reversal In That Plaintiff Is A Limited Public Figure

The District Court found that plaintiff was not a limited public figure and so not required, as a predicate to recovery of "actual" damages, to demonstrate knowing falsity or reckless disregard of the truth on the part of appellants as a matter of federal constitutional law. The Court below reasoned that characterizing plaintiff as a limited public figure, even for the instant publication of limited subject matter and limited distribution to subscribers, would make the public figure versus private individuals distinctions meaningless. Appellants submit that in its reasoning and in its holding, the District Court erred and plaintiff's failure to prove knowing falsity or reckless disregard on the part of appellants requires reversal of the judgment below as a matter of federal constitutional law. Gertz v. Robert Welch, Inc., supra.

While the doctrine of constitutional privilege regarding publications alleged to be libelous enunciated in New York Times Co. v. Sullivan, supra, and amplified in Rosenbloom v. Metromedia, Inc., supra, was modified somewhat by the recent Gertz decision, its basic conceptual support has remained consistently clear over a number of years. Thus,

accounts of the activities of public officials and public figures are constitutionally protected and require a demonstration by the plaintiff that defendants published the matter complained of knowing of the falsity of statements contained therein or with reckless disregard of the truth thereof. New York Times Co. v. Sullivan, supra; Curtis Publishing Co. v. Butts and Walker v. Associated Press, 388 U.S. 130 (1967).

The Supreme Court in Gertz, in trying to accommodate the interests of a free press and harm to reputation, expressly recognized the concept of a "limited public figure" in establishing a very broad test with respect to a designation of individuals as public figures as follows:

> ". . . [i]n some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." 418 U.S. at 351. (emphasis supplied)

Appellants submit that the circumstances here presented are those particularly appropriate for the application of the concept of a limited public figure for a limited range of issues as expressly recognized by the Supreme Court in Gertz.

The element of plaintiff's "voluntary involvement" for the "limited ranges of issues" discussed in the article in the Presidents' Report are both manifest. The publication

complained of was limited in its subject matter to activities in which the plaintiff had voluntarily involved himself* as a senior executive of a major conglomerate corporation discharged because of the breach of his fiduciary duties. Further, it was disseminated to the limited audience of corporate executive subscribers having a particular interest in the subject matter thereof, i.e., the corporate well being of Gulf & Western, one of the major corporations of the world, whose stock is actively traded and whose business involves numerous creditors of every type.

While appellants do not contend that the plaintiff is a public figure for all purposes, it is submitted that the Supreme Court recognized that a designation of an individual as a limited public figure arises from particular controversies involving a limited range of issues as to which the plaintiff has voluntarily involved himself. In an analysis of the limited public figure concept relevant here, one distinguished commentator has described the relevance of the stage on which the plaintiff operates as follows:

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* The Supreme Court in Gertz found that the plaintiff there had engaged in no voluntary activity respecting the subject matter of the article - i.e., an alleged communist conspiracy against police officers exemplified by a specific criminal prosecution not involving Gertz - and, indeed, the plaintiff was in no way involved in the subject matter of the article. Here, the matter complained of in the Report article concerned plaintiffs' voluntary activities concerning the subject matter of the article itself.

> "One caveat may be added to the 'public figure' determination: The size of the stage on which he or she operates is relevant to the definitional question. In fact, the smaller the stage the more likely a 'public figure' will be found. For instance, whereas the chief surgeon of a hospital in New York City might not be considered a 'public figure', the chief surgeon of the only medical center in a smaller town might well be. If this means that smaller communities will proportionately have more public figures than larger ones it may be more of sociological than legal interest." Wilson, "What Hath Gertz Wrought In Libel?", N.Y.L.J., 9/30/74, p. 1, col. 3, p. 5, col. 1.

Here, plaintiff operated on a small, exclusive stage - top management of major American and international companies. To that group, he was well known - in the same way as the surgeon in the small town is well known to that community. A publication such as the Presidents' Report directed to that small stage must be judged both in context of the limited subject matter of the publication and the limited dissemination to subscribers particularly interested in such subject matter. The audience included creditors and suppliers of Gulf & Western and even investors of Gulf & Western who were entitled to know what was taking place in that company. See Fotochrome, Inc. v. N.Y. Herald Tribune, Inc., 61 Misc.2d 226, 230, 305 N.Y.S. 2d 168 (Sup. Ct. Queens Co. 1969). To deny the readership of the Presidents' Report of the very type of information for which the subscription is taken, would interfere with their right to know of current

events in the business world and also would unduly fetter the First Amendment rights of appellants Report and Billings by undermining the very "breathing space" which the Supreme Court sought to protect in Rosenbloom and Gertz.

In cases since Gertz, the concept of a limited public figure has been recognized on numerous occasions and in circumstances far less compelling than those presented here. Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974); James v. Gannett Co., Inc., 366 N.Y.S. 2d 737 (4th Dep't 1975); Cera v. Gannett Co., Inc., 47 App. Div. 2d 797, 365 N.Y.S. 2d 99 (4th Dep't 1975); Jones v. Gates-Chili News, Inc., 78 Misc. 2d 837, 358 N.Y.S. 2d 649 (Sup. Ct. Monroe Co. 1974).

In the instant case, appellants submit that no clearer case for the application of the doctrine of limited public figure with respect to a limited range of issues can be presented. Accordingly, as a matter of federal constitutional law, under the rule of Gertz v. Robert Welch, Inc., plaintiff was required, but failed, to prove that the article was published with knowledge of the falsity of statements contained therein or with reckless disregard thereof.

(3) Under New York Law, a Demonstration by Plaintiff That Defendants Were Motivated by Malice Toward Plaintiff Is Required for the Reason That the Presidents' Report Is a Limited Publication Distributed to Subscribers Having a Common Interest in the Subject Matter Thereof.

The District Court erroneously rejected appellants' defense of qualified privilege based upon the limited nature of the subject matter of the publication and the particular interest of the limited number of corporate executive subscribers to whom it was disseminated. Reversal of the judgment of liability is required for the reason that New York law imposes on plaintiff the obligation to overcome the qualifiedly privileged nature of such a limited publication as is present here by an affirmative demonstration: first, that the statements are false, and secondly, that defendants were motivated by malice toward the plaintiff. Shapiro v. Health Insurance Plan of Greater New York, 7 N.Y. 2d 56, 61, 194 N.Y.S. 2d 509 (1959); Ashcroft v. Hammond, 197 N.Y. 488, 495, 90 N.E. 1117 (1910); Khuri v. M. W. Kellogg Company, 33 App. Div. 2d 736, 737, 305 N.Y.S. 2d 873 (1st Dep't 1969).

New York law is well settled that a qualified privilege attaches to statements made to those sharing an interest in the subject matter thereof. Stillman v. Ford, 22 N.Y. 2d 48, 290 N.Y.S. 2d 893 (1968); Shapiro v. Health Insurance Plan of Greater New York, supra. In the Shapiro case, the New York Court of Appeals stated:

> "A communication made bona fide upon any subject matter in which the party communicating has an interest or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty,

> although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation (Byam v. Collins, 11 N.Y. 143, 150)."

See Trim-A-Way Figure Contouring, Ltd. v. National Better Business Bureau, Inc., 37 App. Div. 2d 43, 322 N.Y.S. 2d 154 (1st Dept. 1971); Clarence D. Davis, Inc. v. Dun & Bradstreet, Inc., 9 App. Div. 2d 796, 192 N.Y.S. 2d 674 (3d Dep't 1959); Raymond Lee Organization, Inc. v. Council of Better Business Bureaus, Inc., 74 Misc. 2d 363, 343 N.Y.S. 2d 502 (Sup. Ct. N.Y. Co. 1973). Gould v. Broad, 22 App. Div. 2d 800, 254 N.Y.S. 2d 190 (2d Dep't 1964), aff'd, 16 N.Y. 2d 666, 261 N.Y.S. 2d 295 (1965).

The Court in Trim-A-Way Figure, supra, held that the alleged false and libelous statements concerning the plaintiff contained in the bulletin prepared by defendant and circulated to local Better Business Bureau members and advertising media and among other interested individuals was qualifiedly privileged. Holding that as a matter of New York common law, summary judgment was required in the absence of affirmative proof of actual malice by the plaintiff, the Court found, at 45:

> "Though publication of the bulletin may well fall within the ambit of the constitutional protection enunciated in New York Times Co. v. Sullivan (376 U.S. 254) and subsequent cases (see All Diet Foods Distrs. v. Time, Inc., 56 Misc. 2d 821 and cases therein cited), we

> find it unnecessary to so decide since we conclude that under the circumstances here presented, its publication was qualifiedly privileged as defined in Shapiro v. Health Ins. Plan of Greater N.Y. (7 NY 56, 60-61). One hundred forty-nine copies of the bulletin were sent to local Better Business Bureaus, 598 to advertising media who were members of defendant, 21 to its board of directors, and 20 to individuals in response to inquiries about plaintiff's operations. Particularly appropriate is the statement in the Restatement of the Law of Torts (vol. 3, p. 240): 'Occasions conditionally privileged afford a protection based upon a public policy which recognizes that it is essential that true information shall be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons, or certain interests of the public. In order that such information may be freely given, it is necessary to afford protection against liability for misinformation given in an honest and reasonable effort to protect or advance the interest in question. Were such protection not given, true information which should be given or received would not be communicated through fear of the persons capable of giving it that they would be held liable in an action of defamation unless they could meet the heavy burden of satisfying a jury that their statements were true."

Where a publication is privileged as a matter of New York law, neither falsity nor negligence is sufficient to establish liability against the publisher. Clarence D. Davis, Inc., supra. In that case, the Court, applying qualified privilege to an allegedly false credit report concerning plaintiff who was allegedly discriminated against as a result thereof, held at 797:

> "Under circumstances of qualified privilege, malice will usually not be inferred alone from the falsity, but must be shown independently.

> Sometimes malice may be shown from such wanton and reckless a disregard of plaintiff's rights as will be regarded as the equivalent of actual malice (Pecue v. West, 233 N.Y. 316, 322). But this is not mere negligence. No authority has been cited to sustain a theory of libel under conditions of qualified privilege based on falsity and negligence without malice."

See Cole Fisher Rogow, Inc. v. Carl Ally, Inc., 25 N.Y. 2d 943, 305 N.Y.S. 2d 154 (1969); Stillman v. Ford, supra; Shapiro v. Health Insurance Plan of Greater New York, 7 N.Y. 2d 56, 194 N.Y.S. 2d 509 (1959).

Also respecting the demonstration of malice required of plaintiffs where the qualified privilege attaches as a matter of state law to publications complained of, the Court of Appeals in Pecue v. West, 233 N.Y. 316, 322, 135 N.E. 515 (1922) held:

> "Malice, however, does not mean alone personal ill-will. It may also mean such a wanton and reckless disregard of the right of another as is ill-will's equivalent. This means more than mere negligence or want of sound judgment. (Hesketh v. Brindle, 4 Times L.R. 199). It means more than hasty or mistaken action. (Hemmens v. Nelson, 138 N.Y. 517.) If the defendant made the statements in good faith, believing them to be true, he will be protected, even if a man of wider reasoning powers or greater skill in sifting evidence would have hesitated. (Clark v. Molyneaux, 3 Q.B. Div. 237.) So if he fairly and in good faith relies on hearsay (Lister v. Perryman, L.R. 4 H.L. 538), which often may reasonably induce action or belief."

In the instant action appellants had the obligation and duty to provide its subscribers with information about important matters affecting major companies, here Gulf &

Western. Similarly, the subscribers had a right to know how Gulf & Western was being managed. Thus, the article in the Presidents' Report concerning Lawlor was qualifiedly privileged. Absent the requisite showing of malice to defeat the qualified privileges of appellants, judgment is mandated for appellants as a matter of law. Stillman v. Ford, supra; Falco v. D'Agostino, 42 App. Div. 2d 590, 344 N.Y.S. 2d 808 (2d Dep't 1973); DeCarlo v. Catalfano, 42 App. Div. 2d 823, 345 N.Y.S. 2d 798 (4th Dep't 1973), aff'd, 34 N.Y. 2d 703, 356 N.Y.S. 2d 616 (1974); Trim-A-Way Figure Contouring Ltd. v. National Better Business Bureau, supra; Green v. Kinsella, 36 App. Div. 2d 677, 319 N.Y.S. 2d 780 (4th Dep't 1971).

In summary, on each of the separate grounds set forth in this Point III of appellant's brief, this Court should reverse the judgment of the District Court.

POINT IV

THE TRIAL COURT'S FINDING OF NEGLIGENCE IS CLEARLY ERRONEOUS, ASSUMING ARGUENDO, SAID STANDARD IS APPLICABLE UNDER NEW YORK LAW

Assuming that a simple negligence standard were applicable under New York law to the instant action, the record evidence clearly establishes that appellants at all times acted with reasonable care in connection with the publication of the article. We submit that the District Court erred in finding that plaintiff satisfied his burden of proof of showing some fault or negligence on the part of appellants which is the minimum constitutional standard for the states established by the Supreme Court in Gertz. Consequently, appellants' motion to dismiss the case should have been granted at the close of plaintiff's case. Certainly, the motion should have been granted upon renewal thereof at the close of the trial.

As part of appellants' case, Billings testified about the basic information which appeared in the article concerning plaintiff. She received the information about Lawlor's discharge from a free-lance professional journalist, formerly employed by Report, known to her for a period of six or seven years (366A). This journalist had always proven accurate and authoritative in the past and enjoyed a favorable reputation in the news media (366A-367A). In addition, since he was a former employee, Billings was fully familiar with

his method of operation (S.T. 391).* Billings then asked an associate editor of Report, Robert Kenney ("Kenney") to check the information received with another source (367A). Kenney confirmed the story with a corporate executive source who verified the same information given to Billings by the professional journalist (S.T. 381). Report had dealt with this corporate executive over a period of years (S.T. 383) and he had proven to be an accurate, authoritative and straightforward source (S.T. 383). In addition, whatever public information was available concerning plaintiff in the files of Report were checked (383A-384A). Prior to publication, Kenney called Gulf & Western to ascertain whether or not plaintiff was still employed there (381A) and he inquired whether there was any forwarding address or telephone listing for Lawlor. He was informed that there was not (S.T. 390). A further attempt to locate Lawlor through the telephone directory was not successful (S.T. 395).

The foregoing circumstances amply demonstrate that appellants acted with reasonable care and diligence in publishing the article. Perhaps, the best evidence of the reasonableness of appellants' reporting rests on the

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* References are to Miss Billings' in camera testimony sealed by order of Judge MacMahon and subsequently made part of the record on appeal under seal (445A), copies of which will be handed up to the Court at the time of oral argument.

substantial accuracy of the article in its entirety and not just one phrase.

However, the District Court found that Billings had either sensationalized the story, misinterpreted the information given or negligently used inaccurate language to describe the facts in the one phrase found defamatory (426A). Undeniably, the information given Billings was subsequently edited within the style and the format of the Presidents' Report - concise and almost telegrammic in form. The statements of the article so edited were nonetheless still derived from the original information obtained which had been subsequently checked out further. Whatever editorial refinements were made by Billings, these are representative of the ordinary and usual functioning of any newspaper in editing news items. This editorial right is the precise "breathing space" the Supreme Court had said publishers must have under the first amendment. Rosenbloom v. Metromedia, Inc., supra, 403 U.S. at 50.

In the final analysis, there is no substantial evidence to show negligent conduct in the publication of the article. The District Court's findings with respect to Billings' misinterpretation of information or use of inaccurate words are unfounded requiring reversal under Rule 52 of the Federal Rules of Civil Procedure as clearly erroneous.

POINT V

IF APPELLANTS ARE LIABLE TO PLAINTIFF IN DAMAGES, ONLY A NOMINAL RECOVERY IS PERMISSIBLE.

Assuming arguendo, a basis for liability by appellants exists, plaintiff is at most entitled to an award of nominal damages upon the facts of this case.*

Initially, it must be emphasized that any review of the propriety of a damage award in a defamation action begins with a careful examination of the "chilling effect" that such an award will necessarily work on First Amendment rights. One Court, in reducing an excessive jury award predicated upon findings of knowing falsity or reckless disregard of the truth (not found in this case), stated:

> "...The Court is well aware of the 'chilling effect' which the threat of potentially large libel verdicts poses to the exercise of First Amendment rights; for this reason damage awards in this sensitive area must receive particularly close scrutiny." Airlie Foundation Inc. v. The Evening Star Newspaper Co., 337 F. Supp. 421, 431 (D.C.D.C. 1972).

There can be no doubt that the District Court's award of $45,000 in favor of plaintiff against appellants based upon a finding of mere negligence, if permitted to stand, will seriously jeopardize the First Amendment rights of all

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* Under New York law, nominal damages usually consist of six cents (6¢). See Walters v. Geheran, 192 N.Y.S. 2d 23 (Sup. Ct. Nassau Co. 1959)

publishers. With respect to appellant Report, which employs a limited staff and which publishes a small weekly publication sold to approximately 3,000 subscribers in the business community, these dangers are even more apparent. (364A, 384A). Moreover, even if a part of the article were inaccurate, the circumstances of this case demand an award of only nominal damages since plaintiff suffered no "actual injury".

In Gertz v. Robert Welch, Inc., supra, 418 U.S. at 350, the Supreme Court restricted defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for "actual injury". In the instant case, the essential elements upon which the District Court based its award of damages to Lawlor were injury to his reputation, humiliation and mental pain and anguish.* Charitably, Judge MacMahon noted that Lawlor's conduct was by no means "free from wrong," and "mitigated" the damages; the Court then deemed $45,000 "a fair recovery". (430A) In view of Lawlor's serious misconduct and the substantial accuracy of the overall content of the article, such an award for any actual injury is patently unfair and should be reduced to a nominal amount.

There are several situations where nominal damages

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* The Court found that any inability for Lawlor to find new employment was not related to the publication of the article by appellants but rather to acts of Gulf & Western (430A).

in defamation actions are proper in New York. Where a charge is serious and false, a nominal recovery is proper: if plaintiff has no reputation to lose; if plaintiff's character is shown to be bad; if the plaintiff is guilty of an offense similar to that charged; or, if the facts are shown tending to prove the truth, but fall short of a complete justification. 1 Seelman, The Law of Libel and Slander in New York ¶341 at 447 (1964).

Accordingly, proof of misconduct which relates to the published charge has a direct bearing on the amount of damages which may be awarded. Crane v. New York World Telegram Corp., 308 N.Y. 470, 126 N.E. 2d 753 (1955); Fleckenstein v. Freedman, 266 N.Y. 19, 193 N.E. 537 (1934); Gressman v. The Morning Journal Ass'n, 197 N.Y. 474, 90 N.E. 1131 (1910). Goodrow v. The Press Co., Inc., 233 App. Div. 41 (3rd Dep't 1931); Goodrow v. Malone Telegram, Inc., 235 App. Div. 3, 255 N.Y.S. 812 (3rd Dept. 1932); Goodrow v. New York American, Inc., 233 App. Div. 37, 252 N.Y.S. 140 (3rd Dep't 1931).

Another factor to be weighed in reducing an award of compensatory damages to a nominal amount occurs when the proven truth of the overall content of the article is established. Osterheld v. Star Co., 146 App. Div. 388, 131 N.Y.S. 247 (2d Dep't 1911). In Osterheld, defendant published an interview with plaintiff's wife in which she

charged him with acts of cruelty and inhuman treatment and stated she was about to sue him for divorce. Plaintiff's suit was based on the charge of adultery. The defendant pleaded the truth of the cruelty charge. The defense was stricken by the trial court. The Appellate Division, in reversing a large verdict for the plaintiff, stated (at pp. 395-96):

> "If the defendant can establish the truth of the allegations of cruel and inhuman treatment set up, such facts would justify a jury in finding the plaintiff was so lacking in the ordinary sensibilities of man that he could not have greatly suffered in mind by the publication of the additional charge of adultery. Some of the particular acts of cruelty alleged in the original answer are of such a grave and serious character that to some minds the commission of adultery might seem the lesser offense. The commission of adultery and cruel and inhuman treatment of the wife are gross violations of marriage duties and obligations, and where both are charged in the same publication we can discover no good reason why, in an action for libel charging the falsity of one part of the article, the truth of the remaining part may not be shown, not by way of justification of the part which is false, but as showing the plaintiff has not, in fact, suffered, and should not recover the same damages he otherwise would be entitled to recover if the whole were false.
>
> Such evidence is technically neither justification nor mitigation, but simply evidence limiting the recovery for compensatory damages to the actual damages sustained, and works no hardship on the plaintiff."

The rationale of this decision is applicable to the instant action. The proven truth as to the overall content

of the article in the Presidents' Report has been fully discussed above. In view of Lawlor's serious wrongdoing, clearly no actual injury to Lawlor's reputation which is the only concern of the law of defamation, can be sustained. Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102, 186 N.E. 217 (1933). In Lawlor's case, his reputation as an employable expert in the labor relations field had been totally destroyed by his activities relating to the Mark Group and his forced dismissal from Gulf & Western. As the District Court found, Gulf & Western's justified refusal to recommend Lawlor and not the publication of the article by appellants was the substantial cause of Lawlor's inability to secure employment. (430A) Further, any humiliation or mental pain which Lawlor claims to have suffered is certainly no more than that which would have been caused had the article been absolutely accurate in meticulous detail or had Judelson's remarks been published instead.

In summary, compensatory damages awarded in a defamation action must be predicated upon the overall impact of the article and must be precisely commensurate with the injury; where no injury occurs or indeed is possible, only nominal damages are proper. See Abell v. Cornwall Industrial Corp., 241 N.Y. 327, 335, 150 N.E. 132 (1925); Paris v. New York Times Co., 170 Misc. 215, 9 N.Y.S. 2d 689 (Sup. Ct. N.Y. Co. 1939) aff'd 259 App. Div. 1007, 21 N.Y.S. 2d 512 (1st Dep't 1940). In this action, the District Court's award of $45,000 in damages is based

entirely on non-existent injury to Lawlor and therefore should be reversed with directions to enter a judgment for nominal damages of six cents (6¢) in the event any liability is sustained by this Court.

CONCLUSION

The decision of the District Court should be reversed and judgment entered for appellants on the several grounds: (a) truth of the article in substance; (b) the defense of privilege under New York law; and (c) the failure of plaintiff in his burden of proof under constitutional standards. Even if the judgment below should be affirmed on the issue of liability, the judgment should be reduced to nominal damages under New York law.

Respectfully submitted,

TOWNLEY, UPDIKE, CARTER & RODGERS
Attorneys for Appellants

John Paul Reiner
Peter C. Gould
Raymond J. Soffientini
Of Counsel

Copy received 9/8/75

Davis J. Stolzar

Atty for Pf-Appellee